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HEARING

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In the Matter of:

Adjustment of the Rates for
Noncommercial Educational
Broadcasting Compulsory
License

Docket No. 96-6
CARP NCBRA

Library of Congress
James Madison Building
101 Independence Avenue, S.E.
Room LM414
Washington, D.C. 20540

Monday,
March 16, 1998

The above-entitled matter came on for
hearing, pursuant to notice, at 10:00 a.m.

BEFORE:

THE HONORABLE LEWIS HALL GRIFFITH, Chairperson
THE HONORABLE EDWARD DREYFUS
THE HONORABLE JEFFREY S. GULIN

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1 P-R-O-C-E-E-D-I-N-G-S

2 CHAIRPERSON GRIFFITH: Let the record
3 reflect, please, that we are now in Executive Session
4 and counsel will inform the Panel when we -- when it
5 is concluded.

6 BY MR. RICH:

7 Q Do you have the last question in mind?

8 A Yes, and I've been searching my mind for
9 an exact example and I'm afraid I don't have an
10 example that exactly answers your question. I would
11 have to refresh my memory to try to hark back to --
12 all I know is that we had interim fees for a period of
13 time with some of the networks.

14 Q Isn't it the case that all of your network
15 license agreements have in fact been final in nature,
16 but have called for certain potential adjustments
17 based on most favored nations type protections?

18 A Well, there have been favored nation
19 clauses in the agreements.

20 Q My question is whether separate and apart
21 from license agreements containing those kinds of
22 conditional rate adjustment clauses, you have in mind

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1 other agreements with were interim in nature, meaning
2 whose license fees otherwise were open to final
3 determination by some other mechanism.

4 MR. KLEINBERG: I'm sorry, other than the
5 most favored nation?

6 MR. RICH: Yes.

7 THE WITNESS: I'm not sure whether that
8 was the only impediment to a final fee.

9 BY MR. RICH:

10 Q But sitting here today you can't identify
11 any agreement which is otherwise interim as you would
12 use that term, is that correct?

13 A That's correct.

14 Q Now according to your testimony, BMI's
15 1996 license fees from the ABC, CBS and NBC television
16 networks total \$32.84 million, is that correct?

17 A That's correct.

18 Q In your oral direct you rounded it to
19 approximately \$33 million?

20 A That's correct.

21 Q Now what was the approximate total of
22 BMI's three network license fees five years earlier in

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1 1991?

2 A I don't know the answer to that question.

3 Q What is your best recollection of the
4 level of those fees?

5 A I would be guessing if I gave you an
6 answer.

7 Q I don't want you to guess. Am I not
8 correct in stating that those fees were not less than
9 \$31.3 million in those years, in that year, combined,
10 ABC, CBS and NBC television networks?

11 A I just don't have that number in my head.

12 Q As BMI's chief financial officer, have you
13 from time to time had occasion to examine the level of
14 fee increases BMI has realized from the three
15 commercial broadcast networks over 5, 10 or other year
16 periods?

17 A I haven't focused on that percentage.

18 Q Do you know, irrespective of the absolute
19 dollar amounts what the approximate level of increase
20 in three network commercial broadcast network license
21 fees BMI has realized between 1991 and 1996?

22 A No, I don't have that number.

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1 Q If I were to suggest to you that it is
2 less than 5 percent is that consistent with your best
3 general understanding?

4 A I don't relate to that, that fee increase
5 as being less than 5 percent between 1991 and 1996.

6 Q When you say you don't relate to it
7 meaning?

8 A Meaning that I have never calculated that
9 particular number.

10 Q The answer is you don't know?

11 A That's right.

12 Q Now you testified both in footnote 11 at
13 page 16 of your testimony and in response to
14 questioning by Mr. Kleinberg that with respect to
15 three network license fees for the period 1997 forward
16 you have now reached agreement with one or more of
17 those networks, correct?

18 A That's correct.

19 Q With whom have you reached final license
20 terms for the period beginning January 1, 1997?

21 MR. KLEINBERG: Well, I'm going to object
22 to this question to the extent that it goes further

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1 than this because, as Mr. Rich well knows and as Mr.
2 Weiss himself indicated the other day, Weil, Gotshal
3 and counsel in this room are representing at least one
4 of the networks in connection with on-going license
5 agreements with BMI and as Mr. Weiss pointed out it
6 would be exceedingly unfair to have matters related to
7 those negotiations brought out here.

8 So I don't have an objection to him
9 indicating which of the three networks, but I am
10 pointedly raising a question if it goes any further.

11 MR. SCHAEFFER: I echo Mr. Kleinberg's
12 concern because in addition to that, my firm, Mr.
13 Koenigsberg and my firm are inside and outside counsel
14 for ASCAP and I think it would be very, very difficult
15 -- a concern if I learned what these details also --
16 really kind of collateral to the case and punitive of
17 Mr. Koenigsberg by virtue of my partnership so that I
18 would strongly urge Mr. Rich and insist if he can at
19 least getting the exact among.

20 MR. RICH: I'm happy to have Mr. Schaeffer
21 leave the room. That solves that problem and as for
22 us the fact of the matter is that this has been put in

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1 issue both in the written testimony and in the oral
2 direct and it's hanging there with the inference that
3 (a) they've been able to reach new terms, and probably
4 with the inference because footnote 11 says BMI
5 anticipates that negotiations will lead to increases
6 that they got some big increase. We're absolutely
7 entitled to learn, in fact, what the levels of
8 increase were. I don't need the dollars to a
9 percentage, but what I do need to know is two fact,
10 with whom they've reached agreement and what levels of
11 increase over a five year period they negotiated.
12 This is testimony not sponsored by us. We didn't
13 create this dilemma if it exists. It was put in at a
14 time when BMI knew we were counsel for NBC into their
15 direct case.

16 CHAIRPERSON GRIFFITH: Okay.

17 MR. KLEINBERG: Well, I think that the
18 fact of the matter is the testimony was prepared six
19 months ago and the question is whether one freezes in
20 time and does not then take into account any change in
21 facts so that the witness is testifying as a factual
22 matter something that is no longer, in fact, correct.

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1 I mean we could have left footnote 11
2 there and not advised the panel that that had changed.
3 Our purpose was not to create the inference that Mr.
4 Rich suggests, but merely not to leave uncorrected the
5 fact that was true in September of 1997 in footnote
6 11.

7 JUDGE GULIN: So if necessary, you'd be
8 happy to strike that portion of the testimony?

9 MR. KLEINBERG: If it avoids this area of
10 inquiry, yes.

11 MR. RICH: I would oppose such a motion at
12 this point. It was proffered as part of the
13 testimony. I think we're entitled to adduce what, in
14 fact, the level of increase has been with the entities
15 they say are central to the fee setting process here.
16 I would add the following without impugning the basis
17 for the objection raised by Mr. Kleinberg that for
18 better or for worse, our law firm as you've now heard
19 represents a host of entities in this area and I would
20 like to believe and I know it personally to be true
21 that we've been to maintain confidentiality as
22 appropriate as between and among clients and respect

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1 it under any grounds rules that have ever been raised
2 and I've never in 20 years of practicing in this
3 industry ever had it intimated to me by my friends
4 either at ASCAP or BMI that we have improperly traded
5 on in a manner of speaking confidential information we
6 learned in connection with negotiations representing
7 one client and handling negotiations for another. And
8 certainly in this court setting I think this is
9 testimony that is very, very relevant.

10 CHAIRPERSON GRIFFITH: All right, just a
11 moment.

12 JUDGE GULIN: Let me ask Mr. Rich a
13 question. If this witness should refuse to answer
14 that question, what would be your remedy?

15 MR. RICH: I would have to think about
16 that. I don't think the appropriate remedy is when
17 trapped pull out your testimony on a subject. I think
18 that would be totally inappropriate. Beyond that, I
19 haven't thought it through.

20 JUDGE GULIN: Okay.

21 (Pause.)

22 CHAIRPERSON GRIFFITH: We'll be with you

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1 in one minute.

2 (Pause.)

3 CHAIRPERSON GRIFFITH: The objection is
4 overruled.

5 BY MR. RICH:

6 Q Mr. Willms, will you please identify the
7 two, I believe you testified to two networks with
8 which BMI has now reached terms for the period
9 beginning 1997?

10 A CBS and ABC.

11 Q Okay, and I don't need to know the
12 absolute dollar fee amounts, but approximately what
13 level of increase over five years do those license
14 agreements call for over the prior five year term?

15 MR. KLEINBERG: I'm going to object to the
16 question for the reasons previously stated, that is,
17 because of the sensitivity of the information, the
18 fact that we were not relying on these figures for
19 purposes of our fee request in this case.

20 MR. SCHAEFFER: And I join in that
21 objection. I have to say it puts counsel in a very,
22 very difficult position.

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1 CHAIRPERSON GRIFFITH: Well, the second
2 sentence in footnote 11 says BMI anticipates
3 negotiations will lead to an increase for each of the
4 networks for 1987, 1997, excuse me.

5 MR. SCHAEFFER: That shouldn't be binding
6 on ASCAP's counsel, information that's now being
7 disclosed creates real ethical --

8 CHAIRPERSON GRIFFITH: Have we not had a
9 ruling?

10 MR. SCHAEFFER: It seems to me it's
11 appropriate for arbitrators and judges to evaluate the
12 information being adduced as prejudiced as opposed to
13 the probative value and I have to say with all due
14 respect, as strongly as I could, I do now.

15 CHAIRPERSON GRIFFITH: We've just
16 discussed that very topic, prejudice versus probative
17 value. Objection overruled.

18 MR. KLEINBERG: I would just add also that
19 the sentence, Your Honor, pointing to, related to the
20 -- anticipates negotiations per week to increase while
21 the question relates to the level of the increase and
22 there is obviously a different question that could be

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1 asked.

2 JUDGE GULIN: Well, that's certainly
3 within the scope of that.

4 MR. KLEINBERG: It is problematic because
5 of the relationships that exist here as Mr. Schaeffer
6 has identified and as Mr. Weiss has identified --

7 MR. SCHAEFFER: May I suggest with all due
8 to respect that everybody from White & Case to leave
9 the room and that this part of the document be sealed.
10 I believe you're creating a terrible problem for
11 everybody under the antitrust law by doing that. I
12 would urge that -- I don't have to know this
13 information and Mr. Kleinberg can answer the question.
14 I don't want to be here and I don't want Mr. Mosenkis
15 to be here when this is verified.

16 CHAIRPERSON GRIFFITH: Well, Mr.
17 Schaeffer, that can be your choice as to when you want
18 to be here or not be here --

19 MR. SCHAEFFER: And I want it sealed.

20 CHAIRPERSON GRIFFITH: But we're trying to
21 determine --

22 MR. SCHAEFFER: And I --

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1 CHAIRPERSON GRIFFITH: Excuse me.

2 MR. SCHAEFFER: I'm sorry.

3 CHAIRPERSON GRIFFITH: We're trying to
4 determine whether or not the objection which has been
5 raised should be sustained or overruled and that's
6 what we're going to determine in just a minute.

7 (Pause.)

8 CHAIRPERSON GRIFFITH: The objection
9 remains overruled. Out of consideration for the
10 concern of counsel though, we're going to direct the
11 Court Reporter to sever this portion of the transcript
12 from the other transcripts of this testimony and that
13 it not be revealed to counsel who, unless they
14 specifically desire to have it.

15 MR. SCHAEFFER: Thank you. May we leave
16 the room at this point?

17 CHAIRPERSON GRIFFITH: Yes, please.

18 (Whereupon, the proceedings went
19 immediately into Restricted Executive Session.)
20
21
22

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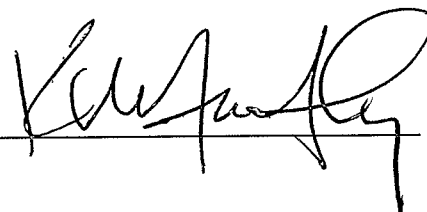
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Before: Library of Congress
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Date: March 16, 1998

Place: Washington, DC

represents the full and complete proceedings of the
aforementioned matter, as reported and reduced to
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A handwritten signature in black ink, written over a horizontal line. The signature is stylized and appears to be 'K. M. [unclear]'.